



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND ARUN KHODPIA, ACCOUNTANT MEMBER**

ITA Nos.171 & 172/CTK/2022

Assessment Years : 2018-2019 & 2019-2020

Indera Garments Pvt Ltd., Main Road, Rourkela, Sundargarh	Vs.	DCIT, CPC, Income Tax Department, Bangalore
PAN/GIR No.AAACI 9173 R		
(Appellant)	..	(Respondent)

Assessee by : Shri Pawan Kumar Agarwal,AR
Revenue by : Shri S.C.Mohanty, Sr DR

Date of Hearing : 23/01/2023

Date of Pronouncement : 23/01/2023

ORDER

Per Bench

Both the appeals filed by the assessee are against the separate orders of the Id CIT(A), NFAC, Delhi, dated 7.9.2022 in Appeal No.ITBA/NFAC/S/2022-23/1045261984(1) for the assessment year 2018-19 and dated 30.8.2022 in Appeal No. No.ITBA/NFAC/S/2022-23/1045039673(1) for the assessment year 2019-2020.

2. Shri Pawan Kumar Agarwal, Id AR appeared for the assessee and Shri S.C.Mohanty, Id Sr DR appeared for the revenue.

3. The appeal for the assessment year 2018-19 is barred by limitation by 15 days. The assessee has filed condonation petition dated 28.11.2022 stating that as the wife of the Director of the assessee company was sick and under treatment during the relevant time, the Director could not come to the office and consequently, there was delay of 15 days in filing the appeal. It is prayed that the delay in filing the appeal may kindly be condoned. Ld Sr DR did not have any objection to the request of Id AR of the assessee. Consequently, the delay of 15 days in filing the appeal for the assessment year 2018-19 is condoned and the appeal is admitted for adjudication,.

4. It was submitted by Id AR that the issue involved in the appeals is delayed payment of PF and ESI of Rs.1,55,516/- for the assessment year 2018-19 and Rs.1,74,155/- for the assessment year 2019-20 in respect of employees contribution. Ld A.R. submitted that the payment was remitted well before the due date of filing of return of income u/s.139(1) of the Act.

5. Ld Sr DR submitted that the issue is now squarely covered by the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd vs CIT in Civil Appeal No.2833 of 2016 dated 12.10.2022, wherein, the Hon'ble Supreme Court has categorically held that if the employees contribution to PF and ESI has been paid beyond the time prescribed under the relevant PF Act, then same is not allowable under section 43B even after the payment has been made before the due date of filing of return

under the Income tax Act. It was the submission that the amount of employees contribution to PF and ESI, which has not been paid within the due date as prescribed under the relevant Act, has been held by Hon'ble Supreme Court to be not allowable u/s.36(1)(va) of the Act. It was the submission that the Hon'ble Supreme Court in paras 52 & 53 has also categorically held that the provisions of section 43B would not apply to the employees' contribution to PF and ESI.

6. We have considered the rival submissions. Admittedly, the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd(supra) has categorically held that the employees contribution to PF and ESI to the extent it is not paid within due date prescribed under the PF Act, is not allowable u/s.36(1)(va) of the Act. The Hon'ble Supreme Court has also admittedly held that the provisions of section 43B would not apply to the provisions of section 36(1)(va) of the Act in respect of employees contribution. Respectfully following the decision of Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd(supra), we are of the view that the delayed payment in respect of employees contribution to PF and ESI is not allowable.

7. In the case of Nirakar Security & Consultancy Services Pvt Ltd vs ITO in ITA No.98/CTK/2022 for Assessment Year 2016-17, order dated 17.10.2022, the Co-ordinate Bench of this Tribunal

after considering the arguments of Id AR, has restored the issue to the file of the Assessing officer with the following directions:

“6. Liberty is granted to the Id AR to make all submissions in respect of allowability of disallowed contribution of the employees to PF and ESI under other relevant provisions in the interest of justice. This direction is being given because Id AR has submitted that as the amount is not allowable under section 36(1)(va) of the Act and same is also not covered under section 43B of the Act, the amount of delayed contribution to PF and ESI in respect of employees contribution would be treated as income in the hands of the assessee u/s.2(24)(x) and on subsequent payment of the same, it would be a business expenditure, which can be claimed u/s.37(1) of the Act. We are not expressing any opinion in regard to his arguments as it has not been examined by the lower authorities. Liberty is also granted to the assessee to raise all arguments as are found necessary by him before the lower authorities.”

8. As the issue in the present appeals is also identical to the issue in the case of Nirakar Security & Consultancy Services Pvt Ltd.,(supra), on identical findings the issue in these appeals is restored to the file of the AO for re-adjudication after granting the assessee adequate opportunity of being heard.

9. In the result, appeals of the assessee stand partly allowed for statistical purposes.

Order dictated and pronounced in the open court on 23/01/2023.

Sd/-
(Arun Khodpia)
ACCOUNTANT MEMBER
Cuttack; Dated 23/01/2023
B.K.Parida, SPS (OS)

sd/-
(George Mathan)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant : Indera Garments Pvt Ltd.,
Main Road, Rourkela, Sundargarh
2. The Respondent: DCIT, CPC, Income Tax
Department, Bangalore
3. The CIT(A)-, NFAC, Delhi
4. Pr.CIT-, Sambalpur
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack